No. 77-444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY CORPORATION, UGP PROPERTIES, INC.,

Appellants,

v.

THE CITY OF NEW YORK, *et al.*,

Appellees.

On Appeal from the Court of Appeals of the State of New York

BRIEF FOR APPELLANTS

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OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 42 N.Y. 2d 324, 397 N.Y.S. 2d 914, and 366 N.E. 2d 1271 (1977). It is set out in Appendix A of the separately bound Appendix to the Jurisdictional Statement. The opinion of the New York Supreme Court, Appellate Division, First Department, is reported at 50 App. Div. 2d 265 and 377 N.Y.S. 2d 20 (1975). That opinion and the accompanying order and findings of fact by the Appellate Division are set out in Appendix

B to the Jurisdictional Statement. The findings of fact and declarations of law, memorandum decision, orders and judgment of the Trial Term of the New York Supreme Court are not officially reported. They are set out in Appendix C to the Jurisdictional Statement.

JURISDICTION

The final judgment of the New York Court of Appeals, the highest court of the state, was entered on June 23, 1977. Appellants filed a Jurisdictional Statement on September 20, 1977, and this Court noted probable jurisdiction on December 5, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). The following cases sustain the jurisdiction of this Court: *Cohen* v. *California,* 403 U.S. 15, 17-18 (1971); *Street* v. *New York,* 394 U.S. 576, 581-85 (1969); *Jamison* v. *Texas,* 318 U.S. 413, 414 (1943).

STATUTES INVOLVED

Pertinent portions of the New York City Landmarks Preservation Law, New York City Charter and Administrative Code, ch. 8-A, and applicable New York zoning resolutions are set forth in Appendix E to the Jurisdictional Statement. Pertinent provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States are set forth in Appendix F to the Jurisdictional Statement.

QUESTIONS PRESENTED

Does the social and cultural desirability of preserving aesthetic landmarks through government action derogate from the constitutional requirement that just compensation be paid for private property taken for public use?

Is Penn Central entitled to no compensation for that portion of the value of its rights to construct an office building over the Grand Central Terminal that is said to be attributable to the efforts of "society as an organized entity"?

Does a finding that Penn Central has failed to establish that there is no possibility that it can earn a reasonable return on its remaining properties in and near the Terminal warrant the conclusion that it is not entitled to compensation for the taking of its air rights above the Terminal?

Does the possibility accorded to Penn Central of realizing some value at some time by transferring the Terminal development rights to other nearby buildings, under a procedure that is conceded to be defective, severely limited, procedurally complex and speculative, and that requires ultimate discretionary approval by governmental authorities, meet the constitutional requirements of just compensation?

STATEMENT OF THE CASE

Penn Central Transportation Company[1] owns the Grand Central Terminal, located in mid-town Manhattan. The Terminal was opened for operations in 1913 and serves as the terminus for a number of railroad lines. As originally designed in the early 1900's, the Terminal was intended as a combined railway station and office building, although the latter was never built.

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[1] Penn Central Transportation Company, certain of its affiliates and UGP Properties, Inc., (hereafter referred to collectively as "Penn Central") are the appellants in this case. UGP Properties, Inc., is a New York corporation and is not affiliated with the other appellants. (J.A. 33-34)

(An artist's conception of the combined terminal and office building is reproduced at J.A. 90) [2] As the Trial Term of the New York Supreme Court found, the Terminal is physically "deteriorating at a substantial rate." (J.S.A. 53)

In August, 1967, over the objection of Penn Central, the Landmarks Preservation Commission of the City of New York (hereafter, the "Landmarks Commission") designated the Terminal and its site as a "landmark" and a "landmark site" respectively. (J.S.A. 53) The Landmarks Commission acted pursuant to authority conferred upon it by a municipal ordinance of New York City, the Landmarks Preservation Law (hereafter, the "Landmarks Law").[3] The effect of the landmark designation was to bar any construction on the site and any alteration of the exterior appearance of the Terminal without prior approval of the Landmarks Commission. N.Y.C. Admin. Code §§ 207-5.0-207-7.0 (J.S.A. 90-93). Moreover, Penn Central is required to keep the Terminal "in good repair." *Id.*, § 207-10.0 (J.S.A. 104). Criminal sanctions could be imposed for violation of the Landmarks Commission order. *Id.* § 207-16.0 (J.S.A. 108-09).

Because of Penn Central's precarious financial condition—a condition which ultimately led to its being ordered into reorganization on June 21, 1970—Penn

[2] References to the Joint Appendix will be designated as "J.A. ——." References to the Appendix to the Jurisdictional Statement will be designated as "J.S.A. ——."

[3] The stated purpose of the Landmarks Law is to prevent the "irreplaceable loss to the people of the city" that might be caused by the alteration or destruction of landmarks. N.Y.C. Admin. Code § 205-1.0 (J.S.A. 76).

Central decided to develop its unused air rights above the Terminal. It entered into arms-length negotiations with UGP Properties, Inc., (hereafter, "UGP") resulting in a lease agreement signed on January 22, 1968. Under the terms of the lease, UGP was to construct and operate a multi-story office building over the Terminal. The term of the lease was for fifty years, and UGP retained an option for another twenty-five years. (J.S.A. 53-54) The lease provided that UGP would pay Penn Central $1,000,000 per year during construction of the office building; after its completion, Penn Central was guaranteed at least $3,000,000 per year, plus additional amounts based on the total space actually rented. UGP also agreed to assume a portion of Penn Central's real estate taxes, estimated to be nearly $600,000. Some existing rental properties (netting between $700,000 and $1,000,000 annually) would be lost because of construction required for the foundations of the office building. (J.S.A. 48)

UGP retained the architectural firm of Marcel Breuer & Associates to design the proposed office building. In compliance with the Landmarks Law, Penn Central and UGP submitted the Breuer design to the Landmarks Commission and applied for a "Certificate of No Exterior Effect."[4] Granting the Certificate

[4] This original design by the Breuer firm would not have changed the facade of the Terminal. Moreover, and like the two alternative designs later submitted, it was in conformity with the applicable New York zoning regulations (as distinguished from the Landmarks Law). No party to this litigation has ever disputed that the Breuer designs conformed to the zoning law.

There are numerous other buildings in the area near Grand Central as large as, or nearly so, as the proposed building over the Terminal. The Pan American building, for instance, is depicted in relation to Grand Central at J.A. 110.

would have permitted construction to go forward. N.Y.C. Admin. Code § 207-5.0 (J.S.A. 90-91). On September 20, 1968, however, the Landmarks Commission denied the application. Penn Central then applied for "Certificates of Appropriateness," N.Y.C. Admin. Code § 207-6.0 (J.S.A. 91-93), submitting the original Breuer plan and two revisions as alternatives. The last of these applications was denied by the Landmarks Commission on August 26, 1969.

Having no further possible remedies before the Landmarks Commission,[5] Penn Central and UGP instituted this action on October 7, 1969. They sought declaratory and equitable relief and money damages, alleging, *inter alia,* that the actions of the Landmarks Commission (prohibiting construction of an otherwise lawful office building over the Terminal) constituted a taking of private property without just compensation in violation of due process and equal protection of the laws.[6] The Trial Term of the New York Supreme Court agreed, and declared the application of the Landmarks

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[5] The Landmarks Law provides that after a denial of an application either for a Certificate of No Exterior Effect or a Certificate of Appropriateness, certain landmark owners may apply for relief because of insufficient return (defined as less than six percent per year of the property's valuation). This relief was not available to Penn Central, however, because it is not extended to railroad property having partial real-estate tax exemption. N.Y.C. Admin. Code § 207-8.0a(2) (J.S.A. 95). As the dissent in the Appellate Division points out, Grand Central is the only such property which has been designated as a landmark. 377 N.Y.S. 2d at 32 (Lupiano, J., dissenting). (J.S.A. 30)

[6] The claims for monetary compensation were severed from the other constitutional issues and judgment on them reserved by the Trial Term of the New York Supreme Court. (J.S.A. 60-61)

Law to Grand Central Terminal unconstitutional. (J.S.A. 51-60, 61-73)

The City of New York and the Landmarks Commission appealed. The Supreme Court's Appellate Division reversed the trial court, upholding the constitutionality of the Landmarks Law as applied and finding that there had been no compensable taking. Two of the five justices dissented, essentially adopting the rationale of the Trial Term. (J.S.A. 16-50)

In affirming the decision of the Appellate Division, the New York Court of Appeals accepted as a central premise that the preservation of landmarks is so socially and culturally desirable that private property taken by the government to achieve such preservation is not entitled to the same compensation as private property taken for other public uses. (J.S.A. 2-3)

It distinguished the Landmarks Law from both zoning and historic-district regulation (J.S.A. 4-5), noting that "[r]estrictions on alteration of individual landmarks are not designed to further a general community plan" (J.S.A. 5), and that "the burden of limitation is borne by a single owner" who "may or may not benefit from that limitation." (*Id.*)

The court reasoned, however, that there was no "constitutional imperative" that a property owner's economic return "embrace all attributes, incidental influences, or contributing external factors derived from the social complex in which the property rests." (J.S.A. 2) In so doing, the court sought to draw a distinction between the "ingredient of property value" created by "the efforts of the property owner" and the "ingredient" created "by the accumulated indirect

social and direct government investment in the physical property, its functions, and its surroundings." (J.S.A. 1-2, 9) For "the limited purposes of a landmarking statute," the court held that "[i]t is enough . . . that the privately created ingredient of property receive a reasonable return." (J.S.A. 2-3) In applying that criterion the court concluded that Penn Central was not entitled to compensation for the loss of its Terminal air rights because it had failed to prove that it would be impossible for it to earn a reasonable return on the balance of its properties in the Terminal area. (J.S.A. 9)[7] It was on the basis of this conclusion that the court determined there was "no taking for which just compensation must be paid." (J.S.A. 5)

Alternatively, the court held that Penn Central had not in any event been "wholly deprived of the development rights above the Terminal," because those rights had been made "transferable" under certain conditions to other nearby properties. (J.S.A. 11) While noting the "many defects" of the City's "transferable development rights" (hereafter, "TDRs") program,[8]

[7] In the New York courts, Penn Central presented substantial evidence that it could not earn, either before or after Grand Central's designation as a landmark, a reasonable return on the Terminal. Penn Central does not press that claim here because this factual question becomes immaterial once the Court of Appeals' error of law in abandoning the just-compensation rule is reversed.

[8] "Transferable development rights" in theory permit a landmark owner to convey to a limited number of nearby properties the right to develop his own property. The rights that can, in theory, be conveyed equal the maximum allowable floor area on the landmark lot less the floor area actually utilized by the landmark. The transferee owners, also in theory, are then permitted to build on their properties to an extent that exceeds the otherwise applicable zoning regulations. Under New York City's plan, the TDRs are not created by the Landmarks Law but by separate zoning resolutions.

and acknowledging that such rights "may not be equivalent in value" to the development rights taken from Penn Central, the court concluded that the TDRs "are valuable" and provide "significant, perhaps 'fair', compensation for the loss of rights above the Terminal itself." (J.S.A. 13-14) Thus, for "the limited purposes of a landmarking statute," (J.S.A. 2-3) the TDRs were considered by the court to be sufficient—even though not "just"—compensation.

SUMMARY OF ARGUMENT

The Court of Appeals, in fashioning special rules to facilitate landmark preservation by government action, has approved the taking of private property without payment of just compensation.

The private property that has been taken consists of the air rights to build above the Grand Central Terminal. The court did not contest, as this Court has held, that an owner is constitutionally entitled to compensation for the taking of air space above his land. *Griggs* v. *Allegheny County,* 369 U.S. 84, 88-89 (1962); *United States* v. *Causby,* 328 U.S. 256, 260-63 (1946). The court erred, however, in holding "for the limited purposes of a landmarking statute" that compensation need not be paid for such portion of the value of air rights that the court asserted to be attributable to the "efforts of organized society" or the "social complex in which the Terminal is situated." (J.S.A. 2-3) The

The transfer of development rights is permitted in any case to any property owner holding contiguous parcels of land; in the case of landmark owners, the extent to which transfers are allowed is somewhat enhanced. (J.S.A. 113-18) *See* Marcus, "Air Rights Transfers in New York City," 36 J.L. Contemp. Prob. 372, 373-75 (1971). *See also* J.A. 30-31.

novel distinction drawn by the court between the "social" and "private" ingredients of private property is supported by no decision of this Court, and is inconsistent with well-established principles governing the valuation of property for purposes of just compensation. *United States* v. *Fuller,* 409 U.S. 488, 492-93 (1973); *United States* v. *Reynolds,* 397 U.S. 14, 16-17 (1970); *United States* v. *General Motors Corp.,* 323 U.S. 373, 378 (1945).

The Landmarks Law clearly operated to "take" Penn Central's property interests in the air rights above the Terminal. *United States* v. *Dickinson,* 331 U.S. 745, 798 (1947). A "taking" for constitutional purposes does not depend upon a formal transfer of title to the taker, *United States* v. *Cress,* 243 U.S. 316, 328 (1917), or physical occupation of the air space in question by the taker. *United States* v. *Causby, supra.* The "political ethics" reflected in the Due Process Clause prevent the public from forcing private owners to bear burdens which should properly be borne by the public as a whole. *Armstrong* v. *United States,* 364 U.S. 40, 49 (1960); *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 325 (1893). That principle is as applicable to landmarking statutes as it is to all other government actions.

The Court of Appeals acknowledged that "[t]his is not a zoning case," (J.S.A. 4) thus correctly distinguishing it from such earlier decisions of this Court as *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926), and recognized that Penn Central bore the full burden of the Landmarks Law with no compensating benefits. The court erred, however, in holding that the taking of Penn Central's air rights without compensation was nonetheless permissible unless Penn Central met the burden of proving that it was incapable of ever earning a reasonable return on its remaining properties near the Terminal. Prior decisions of this Court make clear that an owner is entitled to just compensation for property taken regardless of the value of its remaining property or its prospects of earning a reasonable return on such remaining property. *United States* v. *Fuller, supra; United States* v. *Causby, supra,* 328 U.S. at 262.

The alternative holding of the Court of Appeals that the compensation received by Penn Central for its air rights was constitutionally sufficient, even though not "just," is also erroneous. The assertedly "fair" compensation provided by the City was the opportunity to transfer the air rights over the Terminal to a highly limited number of nearby properties. The value of these "transferable development rights" ("TDRs"), if any, is highly speculative and uncertain. The court recognized that the TDR program contained "many defects," that the area of transferability was "severely limited" and that "complex procedures are required to obtain a transfer permit." (J.S.A. 11) Rights of such concededly uncertain and contingent value fall far short of established just-compensation standards. *Bauman* v. *Ross,* 167 U.S. 548, 584 (1897). There is no justification for viewing them, as the court below did, as all that the Constitution requires "for the limited purposes of a landmarking statute." (J.S.A. 2-3)

The decision of the court below should be reversed and the case remanded for a determination of the appropriate level of compensation to be awarded to Penn Central.

ARGUMENT

Penn Central makes no claim that the preservation of buildings of historical or aesthetic importance is an impermissible objective of governmental action in pursuit of the public welfare. *Berman* v. *Parker*, 348 U.S. 26 (1954); *Roe* v. *Kansas*, 278 U.S. 191 (1929); *United States* v. *Gettysburg Electric Ry.*, 160 U.S. 668 (1896).[9] What is challenged is the holding of the court below that where government seeks to achieve cultural or aesthetic goals—through such devices as the Landmarks Law—it can avoid the constitutional imperative of just compensation that has long governed the taking of private property for all other public needs.[10]

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[9] In all these cases the governmental action in question was approved as an exercise of the eminent-domain power and was accompanied by just compensation to the property owners affected. *See also* Flaccomio v. Mayor & City Council of Baltimore, 71 A.2d 12 (Md. 1950); Pontiac Improvement Co. v. Board of Com'rs, 135 N.E. 635 (Ohio 1922).

[10] Penn Central argues here that the City of New York's action violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. While that amendment does not contain the express language of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation."), the constitutional protections are the same. As this Court said in Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 239 (1897),

> " 'since the adoption of the Fourteenth Amendment compensation for private property taken for public use constitutes an essential element in "due process of law . . . ." ' " (quoting from Mr. Justice Jackson's opinion as Circuit Judge in Scott v. Toledo, 36 F. 385, 395-96 (C.C.N.D. Ohio 1888).

To the same effect, *see* Olson v. United States, 292 U.S. 246, 254 (1934); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); McCoy v. Union Elevated R.R., 247 U.S. 354, 363 (1918). The same result is reached under the "incorporation doctrine." Gideon v. Wainwright, 372 U.S. 335, 341-42 (1963).

In the first section of this brief it will be shown that the Terminal air rights constitute Penn Central's private property whatever may have been the contribution of organized society to the value of those rights. The next section consists of a summary analysis of the decisions of this Court that establish that Penn Central's property has been "taken," within the meaning of the Fifth and Fourteenth Amendments, by the City of New York through the operation of the Landmarks Law. Finally, it will be shown that the TDRs provided by the City of New York do not constitute just compensation for the property that has been taken by the City and that the case should be remanded for a determination of the amount of compensation to which Penn Central is entitled.

I. PENN CENTRAL'S RIGHT TO CONSTRUCT AN OFFICE BUILDING OVER GRAND CENTRAL TERMINAL IS VALUABLE PRIVATE PROPERTY FULLY PROTECTED BY THE CONSTITUTION.

The Court of Appeals effectively concedes, as a matter of State law, that the right to develop the air space above Grand Central is a valuable property interest (known as "air rights"). (J.S.A. 1-2, 12) [11] Decisions of this Court would permit no other conclusion; they have taken a broad and practical view of the constitutional protection afforded private property. In *United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945), this Court defined property as

> "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess,

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[11] *See also* Marcus, "Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks," 24 Buff. L. Rev. 77, 89-92 (1974).

> use and dispose of it . . . . The constitutional protection is addressed to *every sort of interest the citizen may possess.*" (emphasis added)

See also Terrace v. *Thompson,* 263 U.S. 197 (1923); *Buchanan* v. *Warley,* 245 U.S. 60, 74 (1917); Restatement of Property § 5, comment e (1936). *See also Board of Regents* v. *Roth,* 408 U.S. 564, 571-72 (1972); *Perry* v. *Sindermann,* 408 U.S. 593, 601 (1972). Each of the "bundle" of rights of which property consists is entitled to constitutional protection, as the courts long ago recognized. *See, e.g., Eaton* v. *Boston, C. & M. R.R.,* 51 N.H. 504, 511-12 (1872); *Parks* v. *Boston,* 15 Pick. (32 Mass.) 198, 203 (1834); Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 *Yale L. J.* 16, 20-25 (1913).[12] In exercising his "dominion of the physical thing," 323 U.S. at 380, the property owner may choose to exploit the full quantum of rights available to it at one time, or it may choose to exercise them at different points over a longer period. The latter is what Penn Central did with the Terminal property. It first used part of its property rights to build the Terminal. It then decided in 1968 to utilize the remainder of its air rights by arranging for the construction of the office building above the Terminal.[13]

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[12] In addition to the economic factors to be considered in Due Process Clause cases, there are also equitable considerations:

> "in any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." Monongahela Navigation Co. v. United States, 148 U.S. 312, 324 (1893).

[13] As noted previously, p. 5 n.4, *supra,* the various designs for the office tower were all within applicable New York zoning ordinances.

That the "right to develop" above the Terminal is not a corporeal object is no bar to holding that it is nonetheless property, as the court below recognized. This Court has afforded constitutional protection to a wide variety of intangible rights. In *Armstrong* v. *United States,* 364 U.S. 40, 44-46 (1960), for instance, materialmen's liens were held to be property protected by the Fifth Amendment. Similarly, in *United States* v. *Virginia Electric Co.,* 365 U.S. 624, 627 (1961), a flowage easement over an owner's land was deemed to be a protected property interest.

Directly pertinent here are those cases that have recognized as compensable under the Fifth Amendment a property right to use the air space above an owner's land. In *United States* v. *Causby,* 328 U.S. 256 (1946), the government was held to have taken an easement over the owner's property for the flight paths of military airplanes landing on an airstrip near the property. Even though the planes did not actually land on or otherwise occupy the property in question, "[t]he owner's right to possess and exploit the land—that is to say, his beneficial ownership of it. . .," *id.,* at 262, was limited by the noise of the flights. That limitation was held to be a compensable taking. The *Causby* decision was followed in *Griggs* v. *Allegheny County,* 369 U.S. 84, 88-89 (1962), where this Court said

> "the use of land presupposes the use of some of the airspace above it . . . . Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected."[14]

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[14] The United States has, in other contexts, recognized that an owner whose right to develop above his property is limited by governmental action must be compensated. Thus, in United States v. 29.28 Acres of Land in Wayne Township, N.J., 162 F. Supp. 502

See also Portsmouth Co. v. *United States,* 260 U.S. 327 (1922); 2 *Nichols on Eminent Domain,* § 5.7811 at p. 5-300.1 (1976); 4 *id.* § 13.24. Ball, "Division into Horizontal Strata of the Landspace Above the Surface," 39 *Yale L.J.* 616 (1930). *Cf.* Eckert, "Acquisition of Development Rights: A Modern Land Use Tool," 23 *U. Miami L. Rev.* 347 (1969).[15]

While the Court of Appeals did not dispute that the air rights above the Terminal constitute a valuable property interest, it did develop a new theory of valuing property, one wholly at odds with the Due Process Clause. As noted in the Statement of the Case, *supra,* pp. 7-8, the court below attempted to separate the "ingredient of property value" created by the owner's efforts from the "ingredient" created by the "accumulated indirect social and government investment in the physical property, its functions, and its surroundings." (J.S.A. 1-2, 9) It referred to some undefined

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(D.N.J. 1958) the government brought condemnation proceedings to secure, *inter alia,* a "line of sight" easement on lands surrounding a proposed Nike missile base. This easement would require that the owners substantially restrict their rights to develop the property in question. Just compensation was awarded.

[15] The Court of Appeals ignored the fact that Penn Central's development of the air rights over its sunken railroad tracks made Park Avenue "one of this nation's most prestigious residential communities." 377 N.Y.S. 2d at 25 (J.S.A. 20).

> As one treatise puts it,
>
> "The practice of purchasing or leasing airspace or otherwise acquiring rights in airspace is quite common in large urban areas today." Wright, The Law of Airspace 211 (1968).

See also 4 Nichols, *supra,* § 13.24; Machen, "Air Rights Development," 34 Appraisal J. 288 (1966); White, "George Washington Bridge Approach: A Case Study," 34 Appraisal J. 32 (1966); Nelson, "Appraisal of Air Rights," 23 Appraisal J. 495 (1955).

(and in fact undefinable) "social complex in which property rests," (*id.* 2) as part of the basis for its conclusions.

The court below, not surprisingly, offered no precedent for its novel analysis. In fact, the theory underlying that analysis has repeatedly been rejected by this Court, most recently in *United States* v. *Fuller,* 409 U.S. 488 (1973). In that case, the principal issue was the appropriate value to be paid as just compensation for the taking of an owner's fee interest in certain grazing lands. The owner used those fee lands together with public lands under revocable permit from the United States. In his condemnation award, he sought compensation for the value added to the fee lands through their actual or potential use together with the lands available under revocable permit from the government. This Court disallowed the claim for the added value, and made the following statement, highly important for purposes of the present case:

> "we believe that there is a significant difference between the value added to property by a completed public works project, *for which the Government must pay,* and the value added to fee lands by a revocable permit authorizing the use of neighboring lands that the Government owns. The Government may not demand that a jury be arbitrarily precluded from considering as an element of value the proximity of a parcel to a post office building, simply because the Government at one time built the post office. *Id.* at 492-93. (emphasis added)

In this case, therefore, Penn Central is entitled to the full value of its Terminal air rights at the time of taking no matter where in the "social complex" the Terminal may be located, and no matter what other

members of society or the government may have done or failed to do at some time in the past to enhance or to decrease that value.[16]

The decision in *United States* v. *Fuller, supra,* is consistent with several earlier decisions of this Court. In *United States* v. *Reynolds,* 397 U.S. 14, 16-17 (1970), the majority opinion states that

> "the development of a public project may also lead to enhancement in the market value of neighboring land that is not covered by the project itself. And if that land is later condemned, whether for an extension of the existing project or for some other public purpose, *the general rule of just compensation requires that such enhancement in value be wholly taken into account* . . . ." (emphasis added)

Accord, United States v. *Twin City Power Co.,* 350 U.S. 222, 227 (1956); *United States* v. *Miller,* 317 U.S. 369, 376-77 (1943); *Benenson* v. *United States,* 548 F.2d 939, 212 Ct. Cl. —— (1977).

This Court's opinions thus make it clear that "property" is not to be divided artificially into "social" and "private" components in instances such as that involved here. All private property could be subject to the same analysis—to attempt to do so would be to create a principle that could not be contained. Indeed

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[16] This Court early on took a pragmatic view of the economics of property valuation:

> "Neighborhood to the centres of business and population largely affects values. For that property which is near the centre of a large city may command high rent, while property of the same character, remote therefrom, is wanted by but a few, and commands but a small rental." Monongahela Navigation Co. v. United States, *supra,* 148 U.S. at 328.

the court below conceded that the so-called public and private contributions were "inseparably joint." (J.S.A. 9) [17] The analysis undertaken by the Court below is applicable not only to Grand Central but also to a private residence taken for a city park or a farm taken for an interstate highway. If it were so extended, the Due Process Clause would be rendered ineffectual as a restriction on government taking of private property.[18]

Thus, while recognizing that the air rights over the Terminal were property within the meaning of the Due Process Clause, the Court of Appeals severely limited the scope of the "property" rights that it considered to be at issue. In so doing, the court laid part of the foundation for its holding that there was no "taking" by operation of the Landmarks Law, and its further holding that "just compensation" need not be awarded to Penn Central. Because of the fundamentally erroneous appreciation of the property rights at stake, therefore, the court below should properly be reversed.

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[17] Merely as one example of the intractable problems that would be caused by adopting the analysis of the court below, is the following passage from its opinion: "[w]ithout people Grand Central would never have been a successful railroad terminal . . . ." (J.S.A. 7) There is no doubt that this statement is correct. But can there be any exercise more pointless than endeavoring to value Grand Central *without* people? The distinction proposed by the court below between "social" and private ingredients of property thus leads precipitously to a complete *reductio ad absurdum.*

[18] As Mr. Justice Holmes warned in Pennsylvania Coal Co. v. Mahon, *supra,* "the natural tendency of human nature is to extend the [police power] . . . more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." 260 U.S. at 415.

II. PENN CENTRAL'S PROPERTY INTEREST IN DEVELOPING THE AIR RIGHTS OVER THE TERMINAL WAS CLEARLY "TAKEN" FOR CONSTITUTIONAL PURPOSES BY THE OPERATION OF THE LANDMARKS LAW.

The Court of Appeals asserted that the Landmarks Law was an application of permissible government regulation rather than use of the power of eminent domain.[19] (J.S.A. 1) Consistently with that conclusion, the court also ruled that there was "no taking for which just compensation must be paid." (J.S.A. 5) These conclusory holdings appear to rest on two premises. The first is that there is a compelling reason why landmarks should be treated differently from other forms of private property—"the cultural, architectural, historical, or social significance attached to the affected parcel." (J.S.A. 6) Secondly, the court reasoned that as long as the landowner has prospects of earning a reasonable return on such property as it continues to own, the designation of some portion of its property as a landmark, with consequent preclusion of further development, does not constitute a taking. These premises will be examined in turn.

A. There Is Nothing Unique About the Preservation of Landmarks That Renders Constitutional Safeguards Less Applicable Than in the Taking of Private Property for Other Governmental Objectives.

However praiseworthy the desire to preserve historically or culturally significant buildings, the merits of that goal do not warrant treating such structures

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[19] As this Court has previously stated,

> "A claim that action is being taken under the police power of the State cannot justify disregard of constitutional inhibitions." Panhandle Co. v. Highway Comm'n, 294 U.S. 613, 619 (1935).

any differently from other forms of property in the application of constitutional rights.[20] Yet the Court of Appeals based its decision in large measure on the distinction between landmark preservation on the one hand and government utilization of property for all other purposes on the other. The court said explicitly that its holding rested on "the limited purposes of a landmarking statute." (J.S.A. 2-3)

The effect of the court's ruling is to except the Landmarks Law from long-standing Due Process Clause analysis. As with many of the salient points in its opinion, the court below offers no precedential support for its holding on this issue. At least one State court has flatly rejected this exception in similar circumstances:

> "It is laudable to attempt to preserve a landmark; however, it becomes unconscionable when an unwilling private party is required to bear the expense." *People* v. *Ramsey*, 171 N.E. 2d 246, 247 (App. Ct. Ill. 1960).

This Court should also reject a separate constitutional framework for the landmark statute challenged here.

It is plain that

> "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public

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[20] Mr. Justice Holmes provided the appropriate warning a half century ago:

> "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, *supra*, 260 U.S. at 416.

> as a whole." *Armstrong* v. *United States, supra,* 364 U.S. at 49.

This view was fully supported by scholars and jurists writing at the time the Fifth Amendment was drafted. *See, e.g.,* Sax, "Takings and the Police Power," 74 *Yale L.J.,* 36, 54-60 (1964); Dunham, "A Legal and Economic Basis for City Planning," 58 *Colum. L. Rev.* 650, 665 (1958).

In any society, the costs of government will not be distributed totally equally. In this country, however, the right to just compensation when property is taken "prevents the public from loading upon one individual more than his just share of the burdens of government . . . ." *Monongahela Navigation Co.* v. *United States, supra,* 148 U.S. at 325; *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U.S. 405, 428-30 (1935). The Due Process Clause thus embodies a "political ethics," *United States* v. *Cors,* 337 U.S. 325, 332 (1949), that protects private property against even the most popular measures of confiscation. Cormack, "Legal Concepts in Cases of Eminent Domain," 41 *Yale L.J.* 221, 224 (1931).

Acknowledging that it was creating a special principle for landmarking statutes, the court below stated flatly that "[t]his is not a zoning case." (J.S.A. 4) Similarly, the court also rejected an analogy to historic-district regulation. (*Id.* 5) Referring to zoning, but in terms equally applicable to historic-district laws, the court said that "[z]oning restrictions operate to advance a comprehensive community plan for the common good. Each property owner in the zone is both benefitted and restricted from exploitation . . . ." (*Id.* 4) In fact, "both an owner and his

neighbors benefit to some degree and in some manner from zoning and historic districting." (*Id.* 5) Landmark ordinances, by contrast, "are not designed to further a general community plan." (*Id.*) Moreover, in the case of landmark regulation, "the burden of limitation is borne by a single owner." (*Id.*) Thus, not only does Penn Central bear the entire burden, it receives no benefit whatever from preserving Grand Central as a landmark.

The Court of Appeals thus convincingly and correctly distinguished this case from such prior decisions of this Court as *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926), and *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962). Indeed, as the court below agreed, the only possible resemblance the present case has to the law of zoning is to

> "'discriminatory' zoning restrictions, *properly condemned,* affecting properties singled out in a zoning district for more restrictive or more liberal zoning limitations." (J.S.A. 6) (emphasis added)

How then is the Landmarks Law to be saved by the court below from invalidity? Only by reference again to the special purposes of a landmarking law. (*Id.* 6) As just discussed, however, that fact alone cannot justify ignoring the requirement that a taking of private property be accompanied by just compensation to the property owner.

B. The Anticipated Economic Return to Penn Central from the Terminal and Other Nearby Buildings Is Immaterial in Deciding Whether or Not There Has Been a Taking of Its Terminal Air Rights by Operation of the Landmarks Law.

The Court of Appeals held that there was no taking in the present case because "[i]t is enough . . . that the privately created ingredient of property receive a reasonable return." (J.S.A. 2-3) The court went on to say that the Terminal

> "may be capable of producing a reasonable return for its owners even if it can never operate at a profit." (*Id.* 9)

Because Penn Central had failed to prove that the Landmarks Law "eliminates all reasonable return" on the Terminal and other nearby buildings owned by Penn Central, the court held that the Law did not violate the Constitution. (*Id.* 13-14) [21]

The court's analysis is replete with erroneous legal principles. The first is the very concept of "reasonable return." That return is to be provided, under the court's view, only for the "privately created" ingredient of the Terminal's value. Yet the Court of Appeals itself recognized that the so-called "public" and "private" contributions to the Terminal were "inseparably joint." (*Id.* 9) See pp. 16-19, *supra*. The method by which these "inseparable" elements are to be separated is not provided by the court. Moreover, the court agreed that the idea of "reasonable return" was "elusive," "incapable of easy definition" and involved an

[21] In this Court, the City of New York's Motion to Dismiss Penn Central's appeal rested in large measure on the issue of the profitability of the Terminal and the sufficiency of the proof offered below. *See* Motion to Dismiss 22-28.

"obvious" and "inevitable circularity of reasoning." (J.S.A. 6)

The evidentiary obstacles inherent in the Court of Appeals' standard would be virtually impossible to surmount. The speculative nature of the proofs to be offered guarantees that proceedings under the court's standards will be protracted and burdensome.[22] Yet the Court of Appeals provides no guidelines for future litigants. By its own admissions, therefore, the court below conceded that the standard it proposed can never be sufficiently concrete for Due Process Clause purposes. To borrow a phrase from First Amendment case law, the "reasonable return" standard is surely "void for vagueness."

More importantly, the concept of reasonable return on remaining properties is simply not sanctioned by any prior decision of this Court. In other cases where property rights were taken, compensation has been required whether or not any remaining property interest could still earn a reasonable return. For example, in *United States* v. *Causby, supra,* the property owner's chicken-raising business was all but destroyed by the taking of a flight-path easement near his farm. The Court held that such action constituted a taking, notwithstanding that "[s]ome value would remain":

> "The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard

[22] The court below held, for instance, that "the Terminal acts, in effect, as a magnet for Penn Central's other, more profitable, enterprises." (J.S.A. 10) Proving that the Terminal is not a "magnet," as the court below would require Penn Central to do, is (like attempting to prove any negative contention) virtually impossible to do.

> to a vegetable patch, a residential section to a wheat field . . . . But the use of the airspace immediately above the land would *limit* the utility of the land and cause a *diminution* in its value." 328 U.S. at 262 (emphasis added).

See also Griggs v. *Allegheny County, supra; Portsmouth Co.* v. *United States, supra.* This Court did not consider whether Mr. Causby could still earn a "reasonable return" by using his land as a vegetable patch. In any event, in the present case, Penn Central receives *no* return from the unutilized air rights; that can hardly be deemed a reasonable return under any circumstances.

This point can be demonstrated further by a simple illustration. Imagine a property owner, half of whose land is devoted to farming, and half to cattle grazing. Imagine further that the government expropriates the grazing land for a public use, and the owner seeks to receive just compensation for it. He is met by the government's argument that no compensation need be awarded because the owner is making a "reasonable return" on his farm land. Under the rationale of the court below, the government's argument would prevail. Similarly, if the City of New York had condemned for public use one of Penn Central's other buildings near the Terminal, the Court of Appeals' ruling would dictate that Penn Central would be entitled to no compensation unless it could prove that its remaining buildings could not earn a reasonable return. No decision of this Court supports such a result.

Quite to the contrary, *United States* v. *Fuller, supra,* also demonstrates the error of the Court of Appeals' reasoning in this respect. In *Fuller,* the government condemned 920 of 1,280 acres held in fee by the owner and used for grazing purposes. 409 U.S. at 488-89. Following the logic of the court below, the proper inquiry by this Court should have been whether the owner could have earned a "reasonable return" on the remaining 360 acres. Obviously, no such exercise was undertaken, nor was one required under the Due Process Clause. The court below has once again simply developed its own unique and unprecedented theories "for the limited purposes of a landmarking statute." (J.S.A. 2-3) [23]

What is in fact at stake here is the property actually taken—Penn Central's air rights over the Terminal. The property left to Penn Central and the return on that property are immaterial in any consideration of the loss of the air rights. It bears stressing again that these rights are not a mere potential utili-

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[23] It makes no constitutional difference that the present case concerns several rights in the same piece of land while United States v. Fuller, *supra,* involved one right in several "pieces" (acres) of land. As previously discussed, "property" consists of a "bundle of rights," whether considered as the range of possibilities for use or the geographic extent of the territory involved. The Supreme Judicial Court of New Hampshire long ago recognized this commonsense view of "taking":

> "[r]estricting A's unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A than to take from him the title in fee simple to one acre, leaving him the unrestricted right of using the remaining ninety-nine acres. Nobody doubts that the latter transaction would constitute a 'taking of property.' Why not the former?" Eaton v. Boston, C. & M. R.R., 51 N.H. 504, 512 (1872).

In *Eaton,* the court held that the property owner was entitled to recover for damages his land sustained during a freshet because of various pieces of construction by the defendant railroad.

zation of the existing property. They are vested property rights in and of themselves, that, as the next subsection shows, the operation of the Landmarks Law has extinguished.

The concept of a "reasonable return" has an appealing ring. It may properly have a useful role in public-utility ratemaking and similar matters where an ongoing business is subject to reasonable governmental regulations. But it has nothing whatever to do with cases under the Due Process Clause where an owner's property is appropriated by the government, and it should be rejected by this Court.

C. The Court Below Erred in Holding That the Operation of the Landmarks Law Did Not "Take" Property from the Penn Central.

By rejecting the two premises on which the Court of Appeals rested its conclusion that there was no "taking" in the present case (*i.e.*, a special constitutional standard for landmarks and the return on remaining properties), it becomes clear that the operation of the Landmarks Law did in fact amount to a taking for Due Process Clause purposes. Penn Central's air rights above the Terminal, within applicable zoning regulations, were as completely extinguished by the Landmarks Commission as if an existing tower had been destroyed by a City demolition crew.

Mr. Justice Frankfurter, speaking for this Court in *United States* v. *Dickinson,* 331 U.S. 745, 748 (1947), elucidated the constitutional standard for deciding when a "taking" occurs:

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."

See also Armstrong v. *United States, supra,* 364 U.S. at 46; *Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U.S. at 414; 2 *Nichols, supra,* § 6.3 at p. 6-65.[24]

The Landmarks Commission's actions did impose a "servitude" on Penn Central's property, and in a dramatic fashion. Penn Central is now absolutely barred from utilizing the air rights above the Terminal to construct the office tower UGP had agreed to build, operate, and lease. These actions by the City constitute a "taking" even though the City of New York has not formally had title to the property transferred to it. *United States* v. *Causby, supra; United States* v. *Cress,* 243 U.S. 316 (1917); *United States* v. *Lynah,* 188 U.S. 445, 470 (1903) ("While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee is vested."); *United States* v. *Great Falls Mfg. Co.,* 112 U.S. 645, 656-69 (1884); 2 *Nichols, supra,* § 6.1[1], at p. 6-8.[25] Nor does

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[24] The Supreme Court of Oregon recently held that

> "[t]he proper test to determine whether there has been a compensable invasion of the individual's property rights . . . is whether the interference with use and enjoyment is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the plaintiff's land by a sum certain in money. If so, justice as between the state and the citizen requires the burden imposed to be borne by the public and not by the individual alone." Thornburg v. Port of Portland, 415 P.2d 750, 752 (Ore. 1966).

[25] As one commentator put it

> "[t]he obligation to pay compensation is not to be escaped by simply declining to acquire title." Michelman, "Property,

it matter that the City has not itself physically occupied the air space in question. *United States* v. *Causby, supra,* 328 U.S. at 264-65; *United States* v. *General Motors Corp., supra,* 323 U.S. at 378 ("the deprivation of the former owner . . . constitutes the taking."); Berger, "A Policy Analysis of the Taking Problem," 49 *N.Y.U.L. Rev.* 165, 171 (1974); Michelman, *supra,* 80 *Harv. L. Rev.* at 1228. To reach a different result—to hold that no taking had occurred—would allow government to achieve by indirection what it is forbidden to do overtly. *Pumpelly* v. *Green Bay Co.,* 13 Wall. (80 U.S.) 166, 177-79 (1871).[26]

Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harv. L. Rev. 1165, 1186 (1967).

Professor Michelman goes on to point out that what the just-compensation requirement protects against is the

> "capacity of some collective actions to imply that someone may be subjected to immediately disadvantageous or painful treatment for no other apparent reason, and in accordance with no other apparent principle than that someone else's claim to satisfaction has been ranked as intrinsically superior to his own." *Id.* at 1225.

Here, preserving the cultural significance of Grand Central was deemed by the Landmarks Commission to be "intrinsically superior" to the Penn Central's desire to utilize its air rights. In such circumstances, designating Grand Central as a landmark constitutes a taking.

[26] Professor Ackerman, noting several of the ways that the government can obtain control over land, has observed:

> "[a]ll that is required is that a state representative effectively assume the owner's right to control the use of the property." Ackerman, Private Property and the Constitution, 242 n.26 (1977).

The operation of the Landmarks Law has in fact put a "state representative"—the Landmarks Commission—in effective control of the air space over Grand Central.

United States v. *Cress, supra,* provides a good illustration of this Court's practical response to takings involving less than the full fee interest. In *Cress,* the owner's land was subject to periodic floodings because of a government-built lock and dam. The trial court found that these periodic floodings reduced the value of the lands by one half. 243 U.S. at 318. In this Court, the government argued that such a reduction of value did not constitute a "taking" for which the United States was liable. This Court rejected that argument, holding that a taking had occurred. It noted, in affirming the damages award of the trial court, that

> "[i]f any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land." 243 U.S. at 328.

Much the same pattern occurred here. Penn Central was permanently divested of its valuable air rights. That act by the City constitutes a taking even though the railroad Terminal remains.

Likewise, in *Curtin* v. *Benson,* 222 U.S. 78 (1911), the private owner of land within the boundaries of Yosemite National Park brought an action against the Park Superintendent, who had prevented the owner from grazing his cattle on the land in question. The owner challenged the Department of the Interior regulations under which the Superintendent allegedly acted, and this Court declared them invalid. Noting that the owner's right "to pasture his cattle upon his land" was "the very essence of his proprietorship," this Court held that

> "[t]o take it away is practically to take his property away, and to do that is beyond the power even

> of sovereignty, except by proper proceedings to that end." *Id.* at 86.

Thus a practical restriction of a property owner's right *is* a taking for which just compensation is owed. *See also Eaton* v. *Boston, C. & M. R.R., supra,* 51 N.H. at 511-12; *Benenson* v. *United States, supra.*

The government of the City has undeniably decided that by declaring the Terminal a landmark, it has conferred benefits on the citizens of New York. (J.A. 66-67) As the Court of Appeals said, "Grand Central Terminal is no ordinary landmark"; indeed, it rests "in the greatest megalopolis of the western hemisphere." (J.S.A. 7) Preventing alteration of the Terminal saves part of New York's "glorious past" and prevents "mortgaging its hopes for the future." (*Id.* 14) Grand Central is frozen for the benefit of New Yorkers and visitors to the City, and Penn Central pays the costs. Such an enhancement of the government's resource position at the expense of private landholders is plainly a "taking" for Due Process Clause purposes."[27] Van

[27] Professor Ernst Freund found the distinction between a compensable taking and a noncompensable exercise of the police power to be

> "that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not." Freund, The Police Power 546-47 (1904).

Obviously in the present case New York precluded alteration of Grand Central because it believed that so doing would be "useful to the public." That is a political decision, and one that New York might properly make, *but,* under Professor Freund's test, implementing that decision represents a taking for which just compensation must be paid. *See* Michelman, *supra,* 80 Harv. L. Rev. at 1196-1201; Dunham, "Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law," 1962 Sup. Ct. Rev. 63, 75, 80.

Alstyne, "Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria," 44 *So. Cal. L. Rev.* 1, 23-26 (1970); Note, "Landmark Preservation Laws: Compensation for Temporary Taking," 35 *U. Chi. L. Rev.* 362 (1968); Sax, *supra,* 74 *Yale L. J.* at 61-67. *Cf. Aronson* v. *Town of Sharon,* 195 N.E.2d 341 (Mass. 1964) (large-lot zoning ordinance designed to encourage leaving land in its natural state for recreational purposes, and that provided no compensation to property owners, held unconstitutional).

III. PENN CENTRAL IS ENTITLED TO RECEIVE JUST COMPENSATION FOR THE TAKING OF ITS AIR RIGHTS ABOVE GRAND CENTRAL TERMINAL.

Penn Central has demonstrated that its property was in fact taken as a result of the City's application of the Landmarks Law to Grand Central Terminal. By now, it is axiomatic that when government takes private property for public use, it must pay full and just compensation for the taking to be constitutional. *E.g., United States* v. *Pewee Coal Co.,* 341 U.S. 114, 117 (1951); *United States* v. *Lynah,* 188 U.S. 445, 465 (1903); *Monongahela Navigation Co.* v. *United States, supra,* 148 U.S. at 336. The court below concluded, however, that even if there were a taking of Penn Central's air rights by operation of the Landmarks Law, it was not entitled to receive "the 'just' compensation required in eminent domain. . . ." (J.S.A. 12)

A. There Is No Constitutional Basis for Awarding Penn Central Anything Less Than Just Compensation.

In sustaining the Landmarks Law's application to Grand Central Terminal, the Court of Appeals asserted that Penn Central had not been "wholly deprived" of its development rights over the Terminal, but rather "[t]hose rights have been made transferable to other parcels of land in the vicinity . . ." of Grand Central. (J.S.A. 11) However, the court did not even suggest, much less determine, that the TDRs provided Penn Central with just compensation for the taking it had suffered. On the contrary, the court expressly conceded that transferable "[d]evelopment rights . . . may not be equivalent in value to development rights on the original site." (J.S.A. 12) In other words, the court recognized that the TDRs do not afford Penn Central the full and just compensation required by the Constitution.

To avoid a ruling of unconstitutionality, the Court of Appeals returned once more to its untenable assertion (*see* pp. 28-33, *supra*) that there has been no taking of Penn Central's property. For this reason, the court claimed, the compensation provided Penn Central "need not be the 'just' compensation required in eminent domain . . . ." (J.S.A. 12) Instead, the court deemed the TDRs sufficient here simply because they provide "significant, perhaps 'fair', compensation for the loss of rights above the Terminal itself." (J.S.A. 13-14) This holding eliminates any doubt that the Court of Appeals recognized the TDRs could satisfy only some lesser standard than "just" compensation, namely, "fair" compensation.

To be sure, both the words "just" and "fair" have equitable roots, but it is clear from the decision below

that the Court of Appeals was not using the terms synonymously.[28] It so indicated by its citation to an article by the leading TDR theorist. Costonis, " 'Fair' Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies," 75 *Colum. L. Rev.* 1021 (1975). *See* J.S.A. 11-12. Professor Costonis states straightforwardly that his theory of "fair" compensation is a standard "[*l*]*ess demanding* than just compensation." 75 *Colum. L. Rev.* at 1022 (emphasis added).

In resorting to a lesser standard than "just" compensation, the Court of Appeals apparently was again relying on "the limited purposes of a landmarking statute" (J.S.A. 2-3) to avoid the constitutional imperatives of the Due Process Clause. Under whatever guise, however, the rationale of the court below is inadequate. If property is taken by the government, *just* compensation must be paid or the taking cannot constitutionally be permitted. Since the Court of Appeals conceded that just compensation was not awarded to Penn Central here, a concession required by the record (J.A. 31-32, 40-49, 52-60), the application of the Landmarks Law to Grand Central Terminal should be declared unconstitutional. Any other result would open a wide breach in the protections afforded by the Due Process Clause, and deprive property owners of the assurance that their assets will not be expropriated capriciously. Whatever the supposed merit of the political or economic reasons for creating such a breach, the Constitution does not permit it."

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[28] The court below also characterized the TDRs as "reasonable compensation." (J.S.A. 12) What is said in the text about "fair" compensation applies to the "reasonable" characterization as well.

[29] The explanation of the Court of Appeals' decision may lie largely in the well-publicized financial condition of New York City.

B. The TDRs Fall Far Short of the Constitutional Requirement That Penn Central Be Justly Compensated for What It Lost Through Operation of the Landmarks Law.

This Court has repeatedly stressed that the determination of just compensation for particular property is a "judicial function," and "no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard." *United States* v. *New River Collieries Co.*, 262 U.S. 341, 343-44 (1923). *Accord, United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 124 (1950); *Monongahela Navigation Co.* v. *United States, supra,* 148 U.S. at 327. The need for judicial determination of "just" compensation is, of course, a result of the basic principle that "[i]t is emphatically the province and duty of the judicial department to say

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After concluding that the Landmarks Law was constitutional as applied to the Grand Central Terminal, the court observed:

> "In times of easy affluence, preservation of historic landmarks through use of the eminent domain power might be desirable, or even required. But when a less expensive alternative is available, especially when a city is in financial distress, it should not be forced to choose between witnessing the demolition of its glorious past and mortgaging its hopes for the future." (J.S.A. 14)

Neither affluence nor penury, however, determines the reach of basic constitutional guarantees.

To whatever extent, therefore, New York City's financial condition may have influenced the drafters of the Landmarks Law or the court below, the objective of such legislation may not be accomplished through unconstitutional means. Pumpelly v. Green Bay Co., *supra,* 80 U.S. (13 Wall.) at 177-78; United States v. Gettysburg Electric Ry., *supra,* 160 U.S. at 680; Pennsylvania Coal Co. v. Mahon, *supra,* 260 U.S. at 415. The City's financial embarrassment, regrettable as it may be, does not warrant the subversion of constitutional protections.

what the law is." *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 176 (1803).

In its role as constitutional arbiter, this Court has laid down a variety of requirements with regard to "just" compensation. Most fundamentally, this Court has made clear that "just" compensation requires that the owner of taken property receive as compensation an amount equal to whatever is determined to be the property's value. *See, e.g., Danforth* v. *United States,* 308 U.S. 271, 283 (1939); *Olson* v. *United States,* 292 U.S. 246, 255 (1934); *Monongahela Navigation Co.* v. *United States, supra,* 148 U.S. at 312. In the present case, there should be no difficulty in ascertaining such value. It has already been recognized in the agreement between Penn Central and UGP. *Almota Farmers Elevator & Warehouse Co.* v. *United States,* 409 U.S. 470, 474 (1973). UGP and Penn Central agreed in 1968 upon the terms of a lease by which construction and operation of the office building would be undertaken, and that provides the best evidence of the value of the Terminal air rights. No party to this litigation has ever disputed that this agreement was reached after arms-length bargaining, or that the lease price is reasonable.

In many instances where this Court has been faced with questions of valuation, owners have claimed compensation for uses to which their property might be put, but which they had not yet been able to effect. This Court recognized that in such instances the proposed use had to be taken into account for valuation purposes.[80] Moreover, in the present case, there is no need

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[80] United States v. Fuller, *supra,* 409 U.S. at 490; United States v. Virginia Electric Co., *supra,* 365 U.S. at 630; McCandless v. United States, 298 U.S. 342, 345 (1936); Olson v. United States, *supra,* 292 U.S. at 255; Boom Co. v. Patterson, 8 Otto (98 U.S.) 403, 408 (1878); United States v. Causby, *supra,* 328 U.S. at 261.

to hypothesize about the feasibility of the project. UGP and Penn Central had agreed to go forward with utilizing the air rights, and only the Landmarks Law stood in their way.

A further requirement laid down by this Court is that "there must be at the time of the taking 'reasonable, certain and adequate provision for obtaining compensation.'" *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 124-25 (1974), quoting from *Cherokee Nation* v. *Southern Kansas R.R.,* 135 U.S. 641, 659 (1890).[31] The only provision made for compensation in the Landmarks Law is in the form of the TDRs. This Court has effectively made clear that for such nonmonetary benefits as the TDRs to constitute " 'reasonable, certain and adequate' " constitutional compensation, their value must at least be "capable of present estimate and reasonable computation." *Bauman* v. *Ross,* 167 U.S. 548, 584 (1897).

The TDRs simply cannot satisfy these constitutional requirements to provide Penn Central just compensation for the taking it has suffered. The Court of Appeals itself conceded that the value of the TDRs, if any, was highly speculative and uncertain. It discussed at length the "many defects" of the TDR program, noting that the geographic area in which transfers are permitted is "severely limited," and that "complex procedures are required to obtain a transfer permit." (J.S.A. 11) The court's analysis accorded with its decision in an earlier case, where it described the TDRs

[31] *See also* Boom Co. v. Patterson, *supra,* 8 Otto (98 U.S.) at 408; McCandless v. United States, *supra,* 298 U.S. at 345-46; Monongahela Navigation Co. v. United States, *supra,* 148 U.S. at 328-29.

as having an "uncertain and contingent market value" that "did not adequately preserve" the value of the rights taken by the Landmarks Law. *Fred F. French Investing Co.* v. *City of New York,* 39 N.Y. 2d 587, 591, 385 N.Y.S. 2d 5, 7, *appeal dism'd,* 429 U.S. 990 (1976).

Indeed, even those who are proponents of TDRs as a device to preserve landmarks have severely criticized the New York ordinance. Costonis, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks," 85 *Harv. L. Rev.* 574, 586-89 (1972). Those criticisms are worth examining in detail.

First, the applicable New York zoning regulations already permit the transfer of development rights to "contiguous parcels" of land. *Id.* at 586.[32] The TDRs afforded landmark owners such as Penn Central merely permit transfers to lots across the street from the landmark, or to "lots within a chain of common ownership extending to the landmark lot." Marcus, *supra,* 24 *Buff. L. Rev.* at 92. It is apparent, therefore, that the TDRs represent only a very marginal increment of flexibility over what is available to any other real property owners in the City. *See,* pp. 7-8, n. 8, *supra.* It certainly is open to serious question whether the value of this marginal increment of flexibility is susceptible of "reasonable computation"; and, in any event, any *de minimis* additional value that is measurable can hardly suffice to satisfy the constitutional requirement of just compensation in the present case, where Penn Central has been completely deprived of its air rights over Grand Central Terminal itself.

[32] "Contiguous parcels" are viewed as one "lot" for zoning purposes, and hence an owner could develop his single lot as he chose—spreading the bulk of his building evenly over the lot or concentrating it on part of the parcel.

Moreover, even if the TDRs available to landmark owners can be assumed to represent a significantly greater amount of transferability than that available to other property owners, the market for landmark TDRs is extremely confined. There can hardly be a sufficient market demand for the TDRs that would permit Penn Central to receive the full compensation to which it is entitled for loss of development rights over the Terminal. Indeed, the Court of Appeals concedes that the only effective way for Penn Central to use its TDRs is to demolish such existing structures as the Biltmore Hotel, and to build even larger office towers in their places. (J.S.A. 11; *compare* J.S. 31-32, 40-49) By so confining the available uses of the TDRs, New York has—as one commentator observed—further contributed to rendering "virtually worthless" these so-called "rights."[33] Note, "The Unconstitutionality of Transferable Development Rights," 84 *Yale L. J.* 1101, 1109 (1975).

Second, the administrative procedures which a landmark owner is required to follow to transfer the de-

[33] By contrast, the Chicago plan for landmark preservation creates a "transfer district" in the downtown area of Chicago that substantially enlarges the available market within which TDRs can be sold. Costonis, "Development Rights Transfer: An Exploratory Essay," 83 Yale L. J. 75, 86-91 (1973); 2A Nichols, *supra*, § 7.519 [2] [b] at p. 7-248.19. By eliminating the "adjacency" requirement of the New York Landmarks Law, the Chicago Plan is intended, unlike the New York program, "to compensate the landmark owner for the actual losses he suffers." Costonis, *supra*, 85 Harv. L. Rev. at 591.

Penn Central does not assert here that the Chicago Plan necessarily satisfies the Due Process Clause requirement of just compensation. The contrast between the New York and Chicago programs, however, does graphically illustrate how seriously deficient the New York scheme is.

velopment rights are truly "labyrinthine." Costonis, *supra*, 85 *Harv. L. Rev.* at 587. When the owner finds a prospective buyer for some or all of its TDRs, the owner must first obtain the permission of the Landmarks Commission to make the transfer. The Commission, in its discretion, must decide whether the structure embodying the transferred rights will be "compatible" with the landmark. Then, the owner and the potential transferee must secure the approbation of the Planning Commission of the City of New York, which may withhold approval for almost any number of reasons within its almost totally discretionary judgment. The prior decision of the Landmarks Commission will be considered, but it is not controlling. Finally, the New York Board of Estimate must also approve; again, its action is entirely discretionary. 2A Nichols, *supra*, § 7.519[2] at pp. 7-248. 9-10 & n.45. (J.A. 38-40) As a matter of common sense, it is clear that following this tortuous path will take years of effort, expense and travail. As Professor Costonis aptly observes,

> "[t]he maze of discretionary approvals based upon vague aesthetic, planning and urban design criteria are hardly calculated to attract the voluntary participation of developers and landmarks owners." Costonis, *supra*, 85 *Harv. L. Rev.* at 587.

Thus, even if a prospective purchaser for the TDRs could be found, fruition of the transaction must await the unknowable decisions of political decisionmakers. Clearly, such a procedure precludes any determination here that there existed at the time of the taking the "'reasonable, certain and adequate provision for obtaining compensation,'" required by *Bauman* v. *Ross*, *supra*, 167 U.S. at 584. Nor does the present procedure

meet the requirement of promptness of *Crozier* v. *Krupp*, 224 U.S. 290, 306 (1912); *cf.*, *Eubank* v. *Richmond*, 226 U.S. 137 (1912).

Third, and finally, it is Penn Central that must bear the risk of realizing any value through the transfer of development rights. Placing the burden of obtaining "just compensation" on the property owner does not satisfy the guarantee of the Due Process Clause. When the government takes property, it is the government that must assure payment of the compensation owed; otherwise, ultimate receipt of compensation by the owner would not be "certain," as it plainly must be.[34] As the Supreme Judicial Court of Massachusetts said in *Parks* v. *Boston*, "the true rule of justice" is "to pay the compensation with one hand, whilst [the government] apply the axe with the other . . . ." 15 Pick. (32 Mass.) 198, 208 (1834).

In sum, as the court below effectively acknowledged, the inadequacies of the TDRs are so great that they

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[34] Once again, there are alternatives to forcing on the owner the difficult task of marketing the TDRs. One such alternative would involve a "development rights bank":

> "[i]n such a system the landmark owner is compensated in cash for the taking, and the city bears the burden of recouping the cost of the landmark preservation program by selling the development rights directly to developers." Note, 84 Yale L.J., *supra* at 1113.

A development rights bank would thus ensure just compensation to the property owner at the time of taking, the time compensation is generally due. *See*, *e.g.*, Bauman v. Ross, *supra*, 167 U.S. at 598. Moreover, if the TDRs are in fact equivalent to the value of the development rights taken from the owner, the City of New York should have no trouble marketing them. Use of a development rights bank, therefore, would mean equitable treatment for the property owner and no extra burden for the City. By contrast, New York's TDR system imposes all of the hardships on the property owner.

simply cannot satisfy New York City's constitutional obligation to pay "just" compensation for the taking of Penn Central's property. In a phrase familiar to the drafters of the Fifth Amendment, the TDRs are "not worth a continental." They are not in any manner "capable of present estimate and reasonable computation." *Bauman* v. *Ross*, *supra*, 167 U.S. at 584. If anything, they appear, as a practical matter, almost totally worthless. Accordingly, Penn Central has not received the just compensation required in order for the Landmarks Law's application to Grand Central Terminal to be constitutional, and such application, therefore, cannot be sustained.

C. Just Compensation Remains To Be Determined For the Taking That Has Occurred.

It is not necessary for this Court to engage in any estimation or computation of the appropriate level of compensation to which Penn Central is entitled for the taking of its air rights.[35] Because the decision below rested on erroneous constitutional principles, no attempt at valuation was made. It would, therefore, be appropriate here to remand the present case to the state courts of New York for calculation of the just compensation owed to Penn Central.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals of New York,

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[35] One commentator has estimated that, as of 1975, the damages "could run upwards of $15 million." Costonis, *supra*, 75 Colum. L. Rev. at 1076 n.229. As noted in the text, however, the present record does not contain sufficient evidence to make the necessary calculation.

declare the application of the Landmarks Law to the Grand Central Terminal to have been unconstitutional in violation of the Due Process Clause, and remand this case for determination of the appropriate amount of just compensation to be provided to Penn Central.

Respectfully submitted,

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